(12) (14)

Nos. 94-923 and 94-924

In the
Supreme Court of the United States
October Term, 1995

RUTH O. SHAW, *et al.*,
Appellants,
v.
JAMES B. HUNT, JR., *et al.*,
Appellees,
and
RALPH GINGLES, *et al.*,
Appellees.

JAMES ARTHUR "ART" POPE, *et al.*,
Appellants,
v.
JAMES B. HUNT, JR., *et al.*,
Appellees,
and
RALPH GINGLES, *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Western Division

STATE APPELLEES' BRIEF

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QUESTIONS PRESENTED

1. Whether plaintiffs failed to prove they have standing to challenge Districts 1 and 12 in North Carolina's congressional districting plan?

2. Whether North Carolina's plan is subject to strict scrutiny when race was not the predominant factor, but merely one of several factors, motivating the redistricting process?

3. Whether the ultimate burden of persuasion remained with the plaintiffs to prove that North Carolina's plan is not narrowly tailored to achieve compelling interests?

4. Whether North Carolina's plan creating two majority-minority districts is justified by compelling interests in complying with the Voting Rights Act?

5. Whether Districts 1 and 12 in North Carolina's plan are narrowly tailored to serve the state's compelling interests in complying with the Voting Rights Act?

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STATEMENT OF THE FACTS

A. PRIOR PROCEEDINGS

This case presents a constitutional challenge to Districts 1 and 12 in North Carolina's congressional redistricting plan. The challenge is made by five citizens of Durham County, two of whom (Ruth O. Shaw and Melvin G. Shimm) are residents of District 12 and three of whom (Robinson O. Everett, James M. Everett and Dorothy G. Bullock) are residents of neighboring District 2.

On June 28, 1993, this Court, reversing the District Court's 1992 decision dismissing plaintiffs' claims pursuant to FED. R. CIV. P. 12(b)(6), held: "appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw v. Reno*, 509 U.S. ___, 113 S. Ct. 2816, 2832 (1993).

Following remand, defendants, on August 6, 1993, answered the complaint denying its material allegations. Defendants also affirmatively asserted that the plan rationally reflects the General Assembly's application of legitimate redistricting criteria, including the creation of communities of interest based on shared historical, social and economic interests, and that, in any event, the plan is narrowly tailored to achieve the State's compelling interest in complying with Sections 2 and 5 of the Voting Rights Act and in eliminating the present effects of past discrimination. On September 7, 1993, Ralph Gingles[1] and twenty-one other registered voters residing in Districts 1, 8, 9 and 12 were allowed to

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[1] Mr. Gingles was the lead plaintiff in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

intervene as defendants. On November 3, 1993, ten registered Republican voters residing in Districts 4, 6, 9 and 10 were allowed to intervene as plaintiffs conditioned on their adoption of the original plaintiffs' complaint and on compliance with the Court's discovery order entered on September 8, 1993.

The parties engaged in extensive discovery throughout the fall of 1993 and into the winter of 1994. Trial began March 28, 1994. At trial, the parties presented extensive evidence in the form of: (1) stipulations of fact; (2) stipulated exhibits, principal among which were the verbatim transcripts of all public hearings, committee meetings and floor debates conducted by both houses of the General Assembly regarding congressional redistricting in 1991 and 1992; (3) the testimony[2] of several members of the General Assembly, including Representative Toby Fitch, Chairman of the House Redistricting Committee, and Senator Dennis Winner, Chairman of the Senate Redistricting Committee; (4) the testimony of legislative staff, including the testimony of Gerry Cohen, Director of Bill Drafting for the General Assembly and principal draftsman of congressional plans; (5) the testimony of numerous residents of Districts 1 and 12; (6) the testimony of various expert witnesses[3]; and (7) the testimony of the Honorable Eva Clayton and Melvin Watt who were elected to Congress in 1992 from Districts 1 and 12, respectively.

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[2] Pursuant to the Court's March 14, 1994 order, testimony was presented through live witnesses, depositions and witness statements.

[3] The expert witnesses for defendants were Professor David Goldfield, an historian and specialist in southern and urban history; Professor Alfred Stuart, a demographer and co-author of the NORTH CAROLINA ATLAS; Professor Alan Lichtman, an historian and specialist in voting behavior and quantitative analysis; and Professor Richard Engstrom, a political scientist and specialist in measuring racially polarized voting.

B. SUMMARY OF EVIDENCE

This extensive evidence, hereinafter summarized, fully examined the congressional redistricting process in North Carolina and establishes that the General Assembly applied rational and legitimate criteria to create a plan that provides fair and effective representation for all citizens. This evidence further establishes that the plan is narrowly tailored to achieve the State's compelling interest in complying with the Voting Rights Act.

1. The General Assembly's Task and the Tools, Information and Criteria Generally Applied in Accomplishing that Task.

According to the 1990 federal decennial census, North Carolina's population had grown, entitling the State to an additional seat in the United States House of Representatives and increasing the size of the State's delegation from eleven to twelve. JA 45. Responsibility for redrawing congressional districts to account for the shifts and increases in population since 1980 rested with the 1991 Session of the General Assembly, whose members were elected in November, 1990 for two-year terms.[4] JA 43-45. To facilitate the redistricting process committees were appointed early in 1991 by both the Senate and House to prepare and recommend redistricting plans. JA 46-47. Their task was not an easy one. The redistricting process is highly partisan and political. As Representative Fitch, Co-chairman of the House Committee, testified: "Politics [is] what . . . redistricting is all about." JA 406. It is also laden with the need for compromise among many competing, sometimes conflicting, concerns. As Senator Winner, Chairman of the Senate Committee, observed: "at no time in politics . . . are you faced with work that requires a greater ability

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[4] Thirty-six Democrats and fourteen Republicans served in the Senate in 1991 and 1992 and eighty-one Democrats and thirty-nine Republicans served in the House; five African-Americans served in the Senate and fourteen African-Americans and one Native American served in the House. JA 43.

to achieve compromise." JA 695. The inherent difficulty of the redistricting task is increased when, as here, a change in population affords a state an additional seat in Congress. The addition of a seat eliminates the possibility of simply modifying existing lines and forces the redrawing of all lines. Redrawing even part of a line, in turn, produces a "ripple effect" requiring the redrawing of one or more other lines. Tr pp 134-36; Weber Dep 54-75.

In performing their task, the committees were assisted by Gerry Cohen, Director of the General Assembly's Bill Drafting Division. It was Mr. Cohen's responsibility to construct plans based on instructions from the leadership of the redistricting committees. JA 350. The building blocks used in constructing these plans were census blocks, precincts, census tracts, municipalities, townships, and counties. JA 47. Each of these building blocks has recognized boundaries defined by physical features or current or former political boundaries. JA 345. The boundaries of the smallest building blocks, census blocks, were established by the Census Bureau using political boundaries and visible landmarks like streets and bodies of water. There are some 229,000 such blocks in North Carolina. The boundaries of precincts and townships within each of the State's 100 counties were established, respectively, by local election boards and boards of county commissioners based on local needs and conditions and vary widely in size and shape. Today there are 2,377 precincts in North Carolina.[5] Stip Ex 51. Municipal boundary lines are established by city and town boards. They tend to be unstable and irregularly shaped because of annexation policies. O'Rourke Dep 83-84.

The tool used by the General Assembly for constructing districts from these building blocks was software which integrated geographic mapping functions with demographic and statistical

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[5] The varying precinct and census bloc shapes are illustrated in Exhibits 427-30 (maps lodged with the Court).

reporting features. Digital map files provided by the U.S. Bureau of Census allowed the visual display on a computer screen of geographic features, including highways, streets, rivers and railroads, and political boundaries, including county lines, municipal lines, precinct lines, township lines, census lines and Senate, House and Congressional districts lines from the 1980's. Census data provided by the Bureau of Census, including total population and voting age population by race, was also incorporated into the computer files and could be visually displayed on the computer screen for all building block levels. This geographic, demographic and census database was augmented by legislative staff to include voter registration by race and party and election results by precincts for certain statewide elections.[6] This information also could be viewed on the computer screen or printed in a report, and provided some information about the partisan and racial voting patterns in any geographic area.[7] JA 47-48, 344-49.

In addition to the mass of geographic, demographic, census and statistical information contained in the computer database, the members of the General Assembly, individually and collectively, had extensive detailed information about the State's history and geography and about the demographic and socio-economic characteristics of citizens in all parts of the state. The General Assembly is comprised of 170 individual members from every part of the state who bring with them their own personal knowledge and experience. A basic fact of political survival in contemporary politics is that legislators typically possess "detailed knowledge" of the socio-economic, demographic and political characteristics of

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[6] These were the 1990 election for the U.S. Senate between Jesse Helms, a white Republican, and Harvey Gantt, a black Democrat; the 1988 election for Lt. Governor between two white candidates; and the 1988 election for the Court of Appeals between two white candidates. JA 48. The 1990 election was used to estimate racially polarized voting patterns and the 1988 elections were used to estimate partisan voting patterns. Tr pp 367-69, 374-76.

[7] During the course of the trial the manner in which the redistricting software worked was demonstrated to the court.

their districts, and often other parts of the state as well. JA 477-78. Members of the General Assembly also learn much about the demographic and socio-economic characteristics of citizens "on the job." They regularly address issues which require them to study, analyze and learn about the state and its citizens. *See, e.g.*, JA 399.

Well within the knowledge of all legislators was basic historic, demographic and geographic information. North Carolina is divided into three regions, the Mountains, the Piedmont and the Coastal Plain, each of which has a distinctive history, culture and economy. The Mountain region is not heavily populated and contains only one small city, Asheville. The Piedmont is the State's most heavily populated and industrialized region. As of 1990, it contained 54.7% of the State's population, all five of the State's cities with populations larger than 100,000 and forty-seven of the eighty-four towns with populations greater than 5,000. JA 598. The Coastal Plain contains a number of smaller cities but is largely rural. Agriculture and low-wage, labor-intensive industries are the region's principal economic base. JA 65-66; Ex 402 at 23-29.

The Piedmont Urban Crescent is a distinctive subregion of the Piedmont.[8] It extends in an arc from Wake County through Durham, Orange, Alamance, Guilford, Forsyth, Davidson, Iredell, Rowan and Mecklenburg Counties to Gaston County, JA 167, and encompasses a belt of "cities, towns and industrialized countryside" including the State's five largest cities, Raleigh, Durham, Greensboro, Winston-Salem and Charlotte. Ex 402 at 23.[9] The

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[8] In fact, commentators have described the Piedmont Urban Crescent as the "most distinctive" urban corridor in the United States. JA 167.

[9] The dense population in the Piedmont Urban Crescent as compared with the rest of the State is graphically displayed in Ex 414 (map lodged with the Court).

Piedmont Urban Crescent is "the urban, economic and cultural heart and soul of the State." JA 562.

Of North Carolina's 6,628,637 citizens, 5,008,491 (75.6%) are white, 1,456,323 (22%) are African-Americans and 80,135 (1.2%) are Native Americans. JA 64. African-American citizens are concentrated in the rural northern part of the Coastal Plain, in the cities of the Piedmont Urban Crescent and to some extent in the rural south-central and southeastern parts of the Coastal Plain.[10] Native American citizens are concentrated in the southeastern part of the State, particularly in Robeson County where they constitute 38.52% of the population. Stip Ex 197.

To supplement the individual and collective knowledge of legislators, the General Assembly sought and obtained the views of citizens at a series of public hearings held around the State in March and April of 1991. JA 48-49. The notice for these hearings stated the redistricting committees' "particular interest" in the views of citizens "concerning the criteria the General Assembly should use in drawing legislative and congressional redistricting plans" and "the ethnic, geographic, economic, or other communities of interest that may exist within certain legislative or congressional districts that should bear on the General Assembly's consideration." JA 178. Many ideas were expressed by citizens at these hearings; among them were constructing districts based on communities of interest and constructing distinct urban and rural districts. *See* JA 180, 181, 182, 187, 188, 189, 190. For example, a citizen stated that the legislature should "consider combining largely populated, industrialized urban counties together" and "combining rural and agricultural counties in a district." JA 186.

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[10] The concentrations of African-Americans in these areas is graphically displayed in Ex 415 (map lodged with the Court).

Applying their collective knowledge and experience, the Senate and House redistricting committees, with the assistance of counsel, on April 17, 1991, jointly adopted criteria to guide them and the legislative staff in developing congressional districts. Three of the five criteria adopted reflected legal requirements. They were: that "congressional districts shall be drawn so as to be as nearly equal in population as practicable -- the ideal district population being 552,386"; that "the voting rights of racial minorities shall not be abridged or denied in the formation of congressional districts"; and that "all congressional districts shall be single member districts." JA 49-50. Reflecting the likely need to divide counties and municipalities and the possible need to divide some precincts in order to meet these legal requirements, JA 405, the other two criteria simply stated that "[i]t is desirable to retain the integrity of precincts" and that "[c]ensus blocks shall not be divided" except as already divided in the database.[11] JA 50. Consistent with the difficulty of adhering to county and municipal boundaries in the face of these legal requirements, geographic compactness was not adopted as a criterion. As Mr. Cohen testified "it's very difficult to have districts that were geographically compact" and at the same time comply with applicable legal requirements. JA 356.

2. The First Plan

The first redistricting plan was enacted on July 9, 1991. Reflecting a compromise between legislative leaders, like Senator Winner, who believed that the Voting Rights Act did not require the creation of any majority-minority district, and other leaders, like the co-chairs of the House redistricting committee, who

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[11] For purposes of the 1990 federal census, about half of the State's counties, comprising 80% of the State's population, drew their precinct lines to follow census bloc boundaries. In order to accommodate counties whose precincts were split by or did not match census bloc boundaries, the data for approximately 250 census blocs was divided into sub-blocs in the computer database. Tr 293-97.

believed that the Act required two districts, JA 406-07, that plan contained a single majority-minority district. This district, District 1, was formed from the concentration of African-American citizens in the City of Durham at the eastern end of the Piedmont Urban Crescent and in the northern and central parts of the Coastal Plain. African-American citizens constituted 55.69% of the total population of the District, 52.18% of the voting age population and approximately 51.34% of registered voters. Several districts in this plan had highly irregular shapes, including District 1 and majority white districts 2, 3 and 5. *See* JA 543 (map). As the General Assembly anticipated when adopting its redistricting criteria, Ex 200 at 737, many counties (34) and some precincts (12) were divided in the plan. JA 62.

Following enactment of the first plan, legislative staff and counsel prepared and filed the state's submission for preclearance under Section 5 of the Voting Rights Act. In response to complaints made by the American Civil Liberties Union, the Republican Party and others, JA 94, the State strongly defended its plan, emphasizing the advantages and rationality of the sole majority-minority district and negative features of then existing alternative plans containing two and three majority-minority districts, including their lack of geographic compactness and their reliance on African-Americans and Native Americans to form a majority-minority district. JA 123-30, 132-38.[12]

On December 18, 1991, the United States Department of Justice refused to preclear the first plan on the grounds that alternative plans creating a second majority-minority congressional district were rejected by the General Assembly for the apparent "pretextual" purpose of ensuring "the election of white incumbents while minimizing the minority electoral strength." JA 153. The Department also noted that the boundary lines of alternative plans

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[12] Numerous complaints about the State House and State Senate plans were likewise strongly defended. JA 94-123.

creating a second majority-minority district "were no more irregular than found elsewhere in the proposed plan." JA 152. For similar reasons, the Department of Justice in December, 1991, also rejected the General Assembly's House and Senate redistricting plans. JA 149-52.

3. Reevaluation of the Need to Create Two Majority-Minority Districts.

As a consequence of the Department of Justice's decision, the General Assembly was confronted with two related and complex questions: (1) whether a declaratory judgment could be obtained from the United States District Court for the District of Columbia preclearing the plan, and (2) whether, even if preclearance could be obtained, the plan was vulnerable to challenge under Section 2 of the Voting Rights Act because it only created a single majority-minority district. The General Assembly decided to draw two districts. It did so, as Representative Fitch testified, to remedy past discriminatory practices and to comply with the Voting Rights Act. JA 425. The members of the General Assembly, particularly members of the redistricting committees, like Representative Fitch, were well-positioned to make this determination. They knew about the State's history of discrimination against African-American citizens and acknowledged it in debates in committee and on the floor. JA 194 ("You cannot blame the Voting Rights Act . . . . So if you want to blame something, I'm not going to use the term *racism*, but let's use the term *insensitivity*.) They knew about the vestiges of that discrimination. JA 294-99. They were "painfully aware" that this Court in *Gingles v. Thornburg* recently had found they had transgressed Section 2 of the Voting Rights Act in constructing legislative districts in the Coastal Plain and in the Piedmont Urban Crescent. JA 395. Similarly, they knew about Section 2 litigation against counties, cities and school systems throughout the State. JA 395-96. They knew about the rigors of Section 5 and hotly debated its reach. *Compare* JA 197 ("I think that the Bush administration . . .

has forced us to do things the Voting Rights Act does not require.") and JA 210 ("The Bush administration didn't have anything to do with the past hundred years of this Body not having created a black congressional district."). They knew about the persistence of racially polarized voting, and they knew about the persistence of racial appeals in campaigns, especially in the 1990 U.S. Senate Helms-Gantt election. JA 236-37, 495 (infamous "white hands" advertisement); JA 495 (ads depicting Gantt campaign as a "black operation"); JA 495-96, 648-49 (post-cards to black voters suggesting criminal prosecution). They knew that district lines could be drawn to include African-American citizens, as well as exclude them, and so stated in floor debates. JA 213. ("We have known jaggered lines, crooked lines, meandering lines all along. But they have served different purposes. They have served to practice and effectuate the politics of exclusion. But now, when we begin to talk about the politics of inclusion jaggered, crooked, meandering and curved lines become a big question in the minds of lots and lots of people.") They knew that Republican legislators,[13] the American Civil Liberties Union and other organizations and persons had developed and proposed plans that created two and three majority-minority districts. They knew that the Department of Justice had cited these alternative plans and the significant percentage of African-American citizens in the State's population in concluding that the General Assembly had rejected creation of a second district in order to protect the reelection prospects of white incumbents. JA 155-57. They knew that no African-American had been elected to Congress for ninety years even though African-Americans constituted 23% of the State's population. JA 219. Finally, they believed from their own

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[13] In presenting their plans, Republican legislators, were motivated by the belief that the creation of multiple minority districts would enhance the political fortunes of the Republican Party in North Carolina. As Jack Hawke, Chairman of the North Carolina Republican Party, testified "[b]ecause at the present time in the State of North Carolina most minority voters vote straight Democrat, the creation of minority districts elects a minority representative and therefore dilutes the Democrat vote in the remaining districts." Hawke Dep 15, 18-19.

experience that the creation of majority-minority districts alleviated racially polarized voting and pointed to a better tomorrow. JA 194 ("White voters change their opinion once they have an opportunity to communicate and to see what Black citizens can do if they are given an opportunity."); JA 224-25 (The "reality" of creating opportunity districts "can lead to [the] ideal" of a color-blind society.).

Legislators also had the benefit of citizens' views in reevaluating the need for two districts. At a public hearing on January 8, 1992, one citizen, for example, observed that "it is important that you treat all urban areas alike and that you place minority concentration in all urban areas in a similar district," JA 189, and another citizen suggested separating "large metropolitan areas" from "small, rural counties" to "allow a better distribution of political power throughout the state." JA 190.

4. Plans Presented at the 1992 Special Session of the General Assembly.

Three districting plans containing two or more majority-minority districts received particular attention and were presented in committee and on the floor at the January 1992 special session of the General Assembly. One plan was presented by Representative Justus, a Republican. In addition to compliance with the Voting Rights Act, the criteria he applied in constructing this plan (labeled "Compact 2 Minority Plan") were (1) compactness, (2) contiguity and (3) disregard for incumbency protection. Stip Ex 200 at 1192-93, 1258-59. District 2 in this plan (56% African-American) was located in the northern Coastal Plain and Piedmont and District 6 (48% African-American and 8% Native American) ran from Charlotte eastward along the South Carolina border and then northward to Raleigh. *See* Ex 10N (map lodged with the Court). Another plan was presented by Representative Flaherty, also a Republican. The only criteria he applied in the construction of this plan were (1) the creation of three majority-minority

districts and (2) compactness. Stip Ex 200 at 1203-05, 1230. District 2 in this plan (57% African-American) was located in the northern Coastal Plain with arms extending into Raleigh and Durham; District 7 (41% African-American and 9% Native American) ran from Charlotte along the South Carolina border to the coast; and District 12 (54% African-American) ran from Charlotte through Greensboro to the Virginia border. *See* Ex 10Q (map lodged with the Court). Five reasons were advanced in debates in committee and on the floor for rejecting those plans: (1) they indiscriminately mixed urban and rural areas; (2) they indiscriminately mixed the Piedmont and the Coastal Plain; (3) they combined African-Americans and Native Americans to form a majority-minority district when an analysis of voting behavior suggested that these groups may not vote cohesively in primary elections; (4) they were less functionally compact than the plan enacted; and (5) they were unfair politically. JA 203-05, 234-36, 260-61, 264; Stip Ex 200 at 950-52, 1295.

The genesis of the third plan, the plan ultimately enacted, was a plan first proposed by Representative David Balmer, a Republican, and subsequently proposed or endorsed, with modifications, by Representative Thomas Hardaway, an African-American Democrat, the National Committee for an Effective Congress, John Merritt (an aide to Congressman Charles Rose), and the National Association for the Advancement of Colored People. JA 244, 250. In each of these plans, District 1 was centered in the northern part of the Coastal Plain with arms variously extending south and southeasterly, or southwesterly into Raleigh or Durham, and District 12 began in Charlotte and ran northeasterly in a narrow corridor through the western part of the Piedmont Urban Crescent to Greensboro and thence northward to the largely rural Virginia border counties with arms extending southward from these border counties back into Burlington and Durham in the eastern half of the Piedmont Urban Crescent. *See* Exs 10K, L, M and Exs 420, 421, 422 (maps lodged with the Court).

The location and shape of District 1 as finally enacted generally conforms to District 1 as first proposed by Representative Balmer and others except that: (1) the district is located entirely within the Coastal Plain without any extension into Raleigh or Durham on the eastern end of the Piedmont Urban Crescent and (2) the arms of the district tend to extend further south and southeasterly. Likewise, District 12 as finally enacted generally conforms to District 12 as proposed by Representative Balmer and others except that: (1) the district is located entirely within the Piedmont Urban Crescent and (2) does not include any of the largely rural counties along the Virginia border but does include Winston-Salem midway the Crescent and Gastonia on the western end of the Crescent. JA 244, 250; *compare* JA 549; Exs 10K, L, M and Exs 420, 423 (maps lodged with the Court).

5. The Location and Shapes of Districts 1 and 12, the Factors Causing Those Locations and Shapes and Their Characteristics.

The final locations and shapes of Districts 1 and 12 were caused by consideration of a series of factors, and the interplay among them. These factors included (1) the specific decision by the General Assembly to make District 1 a largely rural district in which at least 80% of citizens resided outside of towns larger than 20,000 persons and its mirror decision to make District 12 a distinctively urban Piedmont district in which at least 80% of citizens resided in cities larger than 20,000 persons (JA 356-60); (2) the General Assembly's corresponding decision to group together in District 1 citizens who shared the historical, cultural and economic traditions of the Coastal Plain and its mirror decision to group together in District 12 citizens who shared the historical, cultural and economic traditions of the Piedmont Urban Crescent (JA 203, 368, 411); (3) precise compliance with one-person, one-vote requirements; and (4) political considerations including avoidance of the pairing of incumbents, preservation of the cores of incumbents' districts and protection of the political interests of

the majority party. JA 363, 369-80, 386, 414-16. The impact of these factors on the location and shapes of Districts 1 and 12 was, as the drafter of the plan testified, "quite extensive." JA 397. *See also* JA 350-66, 385. In the minds of Republican legislators, however, the driving force behind the shapes and locations of these districts was simply partisan politics. *See* JA 272-75, 285, 292; Stip Ex 200 at 931, 954, 1249. As Senator Cochrane stated on the floor, the construction of the districts "is not a racial issue, it is a partisan issue," JA 239, and as Representative Pope stated on the floor, construction of the districts reflects "pure partisan gerrymandering." JA 285.

Tracing the impact of these and other factors on boundaries, and determining their relative weights, cannot be accomplished within the confines of this brief. However, the most significant aspects of the causal relationship between these factors and the location and shapes of Districts 1 and 12 can be briefly summarized.

The core of District 1 is a group of rural northern Coastal Plain counties whose population is too sparse to constitute a congressional district but which does have a significant concentration of African-American citizens. In order to gain sufficient population for the district, the first plan had extended westward into the Piedmont, including urban Durham County. JA 543. The decision to draw a distinctively rural Coastal Plain district precluded extending the district westward into the Piedmont. A southerly extension of the district, however, would encompass more Section 5 counties and had strong historic, geographic and demographic support. From 1872 until 1967, a district was drawn which began in the rural northern Coastal Plain counties and extended well to the south and southeast, Exs 58-61 (maps lodged with the Court), and in 1898 the State's last African-American congressman had been elected from this district (the "Old Black Second"). JA 367-68, 413. Southward and southeastward extensions of the district in large blocks, however, would remove

substantial parts of the cores of the existing districts of incumbent Congressman Rose, who chaired the House Administrative Oversight Committee, Congressman Valentine, who chaired a House science and technology subcommittee, and Congressman Lancaster. JA 368-69. Southward extension would also encompass some of the largest towns in the Coastal Plain, Goldsboro, Rocky Mount, Wilson and Fayetteville. Thus, in order to protect the cores of these incumbents' districts and to maintain the goal that 80% of citizens would reside in towns of less than 20,000 persons, various arms, sometimes connected by narrow corridors, were added to the core to gain the number of citizens required for a district. JA 369-79.

District 12 is the State's "new" district. Its core is the State's major cities extending along the axis of the Piedmont Urban Crescent and the concentration of African-American citizens in those cities.[14] Its location is directly attributable to the decisions of the leadership of the redistricting committees (1) to construct a Democratic district from the Republican leaning counties of the Piedmont instead of from the Democratic leaning counties in the area from Charlotte eastward to the coast (Tr 330), (2) to construct a distinctively urban district in the Piedmont Urban Crescent with at least 80% of its citizens residing in cities and towns with more than 20,000 (JA 356-60), and (3) to protect Democratic Congressman Neal, who chaired a House banking subcommittee, and Congressman Hefner, who chaired a House appropriations subcommittee (JA 363-64). It is these factors in combination that resulted in the decision to remove rural counties along the Virginia border from the district as originally proposed and to add Winston-Salem and Gastonia. JA 356-60, 364. Similarly, the use of narrow corridors through the Piedmont Urban Crescent to connect

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[14] The names of many of these cities (Charlotte, Winston-Salem, Durham) and counties (Mecklenburg, Forsyth, Durham) should have a familiar ring to the Court. They are areas where this Court required the construction of majority-minority districts in *Gingles*. 478 U.S. at 35 n.2.

its major cities is directly attributable to the decisions to create an urban district and to protect incumbents. JA 365-66.

The criteria adopted by the redistricting committees on April 17, 1991, to guide the redistricting process and the additional criteria thereafter applied in the construction of districts, particularly the urban/rural and Coastal Plain/Piedmont Urban Crescent criteria and political considerations, are reflected directly in the essential characteristics of Districts 1 and 12. Both districts, as well as all other districts, conform precisely to one person, one vote principles. Both districts protect the voting rights of African-American citizens by providing them with effective but not "packed" voting margins.[15] Neither district adheres strictly to county, city or town boundaries, but both districts closely adhere to precinct and census block lines.[16] District 1 is a largely rural district located entirely within the Coastal Plain with its distinctive historical, cultural and economic traditions. District 12 is a distinctively urban district located entirely within the Piedmont Urban Crescent with its distinctive historical, cultural and economic traditions.

6. The Plan Provides Fair and Effective Representation for All Citizens.

The basic purpose of congressional districting is to provide fair and effective representation for all citizens in Congress. The enacted plan achieves that purpose by creating districts containing

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[15] In District 1, African-American citizens constitute 52.41% of the registered voters and 53.40% of the voting age population and in District 12 African-American citizens constitute 54.71% of registered voters and 53.34% of the voting age population. JA 62. The results of the 1992 primaries in District 1 illustrate that African-Americans are not artificially "packed" in these districts. The first 1992 primary in District 1 was led by a white candidate. Stip Ex 64.

[16] Forty-three counties and approximately eighty precincts are divided in the enacted plan. JA 62. In the first plan, by compassion, thirty-four counties and twelve precincts were divided. All divided precincts already existed in the database. *See supra* note 11.

precisely the same number of citizens and by creating two racially integrated districts that provide African-American citizens a reasonable opportunity to elect candidates of their choice. Largely uncontroverted evidence further establishes that the purpose of districting was also achieved by the General Assembly in other significant respects.

First, Congressional districts provide fair and effective representation when they group together citizens to form communities of interest based on their historical and cultural traditions or their similar socio-economic characteristics. The more similar the interests of citizens in a district the more nearly they can speak with one voice and the more nearly their representative can respond to that voice. JA 434.

There are strong communities of interest in District 1. They flow from the district's location in the Coastal Plain and that region's distinctive history, culture and economy. Witness after witness testified to the poverty that plagues the citizens of the district, a poverty, as Representative Fitch testified, that does not honor "boundaries of *county* or precinct" and that "transcends that entire area." JA 418. This poverty is not limited to one race; it extends to all the district's citizens, both white and African-American. A study by Professor Alan Lichtman demonstrates that the socio-economic status of citizens of the district -- whether evaluated with or without regard for race -- is the lowest of the State's twelve congressional districts as measured by a series of factors including per-capita income and the percentage of high school and college graduates. JA 454.[17] Similarly, document after document reveals the citizens' unifying interest in agriculture. Sixty-four percent of the State's harvested cropland is located in

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[17] *See also* comparative socio-economic data for North Carolina's twelve districts set out in M. BARONE AND G. UJIFUSA, ALMANAC OF AMERICAN POLITICS (1994), at 945-970, which confirms that the socio-economic status of citizens in District 1 as measured by education, household income and per-capita income is substantially lower than in any other district.

the counties that form the district and the majority of the State's annual production of tobacco, peanuts and cotton is in counties wholly or partly located in the District. JA 65-66. These shared problems and interests are being addressed by Representative Clayton, through her service on committees directly related to her constituents' interests, the House Agriculture Committee and Small Business Committee.

Strong communities of interest also exist within District 12 which is "the most urban district (86%) in the State." JA 461, 601.[18] These communities of interest are the product of the district's location on "the spine of the North Carolina Piedmont Crescent," a "distinct regional entity" with "historical integrity." JA 562, 573; Ex 402 at 19. In 1907 Journalist Arthur Page characterized the Crescent as "one long mill village" (JA 567); in 1960 researchers observed that "interrelationships between cities in the Piedmont Crescent appear to be unusually strong and diffuse" and that "people within the Crescent look to each other more than they look outside the Crescent" (Stip Ex 49); today it is a "preferred mega corridor for business." Ex 402 at 15. Witness after witness testified to the shared interests of all citizens of this urban district in central city development, urban redevelopment, the banking industry and the textile industry. JA 625-74. These shared problems and interests are being addressed by Representative Watt, through his service on the House Banking, Finance and Urban Affairs Committee and the House Judiciary Committee. JA 499.[19]

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[18] *See also* BARONE AND UJIFUSA at 970.

[19] A study conducted by Professor Lichtman reveals that irregularly shaped Districts 1 and 12 better encompass citizens with shared interests than most of the other more regularly shaped districts. Analyzing nineteen socio-economic and demographic characteristics for citizens residing within each of the twelve districts, Professor Lichtman found that as measured by those characteristics District 1 is "the fourth most homogeneous congressional district in the State" and that District 12 is "the second most homogeneous district in the State of

(continued...)

Second, fair and effective representation for citizens is provided when congressional districts are distinct one from another. The more distinctive the districts in a plan, the better the plan reflects different interests within the state and provides for a diversity of representation within a state's congressional delegation. JA 452.

Districts 1 and 12 are plainly distinct one from the other; so too are all districts in the plan. Professor Lichtman examined a series of socio-economic and demographic characteristics of the citizens residing in each of the State's twelve districts to determine the extent to which the districts by those measures are distinctive. He found that the twelve districts are almost as distinct one from the other as mathematically possible.[20] JA 455.

Third, fair and effective representation is provided when districts are drawn so that voters and their representatives may easily communicate with each other. Geographic compactness is one measure of the degree to which communication is facilitated but it is not a complete measure and can be an inaccurate measure.[21] For example, measures of geographic compactness provide no information about the extent to which communication

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[19](...continued)
North Carolina." JA 439-40. Similarly, Professor Lichtman found that the congruence of opinion of voters in irregularly shaped Districts 1 and 12 concerning issues before Congress was just as high or higher than the congruence of opinion of voters in regularly shaped District 4. JA 443-51.

[20] Since socio-economic differences among districts to some extent may reflect differences in their racial composition, Professor Lichtman strictly controlled for this phenomenon by examining data reported separately for whites and African-Americans. The level of distinctiveness among the districts remained high. Professor Lichtman also compared the distinctiveness of the 1992 districts with the distinctiveness of the 1982-92 districts. He found that the 1992 districts, though irregularly shaped, are more distinctive than the more regularly shaped 1982-92 districts. JA 455-72.

[21] In fact, some scholars believe that modern means of transportation and communication have made geographic compactness an antiquated concept. JA 320-21.

is eased or facilitated within a district by the existence of shared historical, cultural or socio-economic traditions among citizens or the extent to which communication within a district is made easy by networks of highways and other means of communication. JA 323-24.

Districts 1 and 12 are not geographically compact by mathematical measures but they are functionally compact in that they were constructed in a manner that facilitates communication between voters and their representatives. Both districts group together citizens with shared problems and interests relevant to the responsibilities of a member of Congress. This homogeneity allows voters to communicate their needs and concerns to their representatives forcefully and without ambiguity. Poverty and agriculture are issues of abiding concern to all citizens in District 1, both white and African-American, and they are of abiding concern in Congress. Every day citizens in District 12 confront problems of rapid growth as they drive to their jobs in banks and in textile and cigarette factories, and everyday Congress addresses issues affecting these interests.

Ready means also exist within both districts for communication and interchanges among citizens and among citizens and their representatives. District 12 is laced together by interstate highways and is served by three major airports. A veteran of congressional campaigns, Senator Howard Lee, observed in floor debates that campaigning in District 12 would be "a whole lot easier" than campaigning in some 1982-92 districts and in the Charlotte to Wilmington district proposed by Republicans. Representative Watt testified that District 12 is "one of the more accessible congressional districts" in the country. JA 507. A voter (or member of Congress) can drive from one end of the district to the other in less than three hours,[22] and every day

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[22] The average driving time for all 1992 districts is 2.6 hours. Ex 402 at 41-43.

approximately 118,600 citizens commute among the ten counties in the district. Ex 402 at 43-45. To further facilitate communications with voters, Congressman Watt has established several local offices in the district. JA 662, 671-72.

District 1 is largely rural and thus is spread over a much larger geographic area than District 12. Nevertheless, a voter or member of Congress may drive from one end of the district to another in approximately four hours with relative ease. As Representative Fitch testified, "A person who sits down can very easily understand how . . . to represent, and . . . effectively represent those who live within the 1st Congressional District." JA 418. To further facilitate communications with voters, Congressman Clayton has established two local offices in the district.

Fourth, fair and effective representation is provided when districts are drawn to create racially integrated districts in which the interests of citizens transcend the color of their skin. Similarly, fair and effective representation is provided when districts are constructed to recognize that the interests of African-American citizens are not fungible.[23] These twin goals are met by Districts 1 and 12. The rural and agriculturally based Coastal Plain culture and economy of District 1 is worlds apart from the urban and industrially based Piedmont Crescent economy and culture of District 12. JA 411. These historical, cultural and economic differences have produced an affinity among citizens that transcends race. As Professor David Goldfield testified, "[b]oth black and white residents of the [Piedmont and Coastal Plain] have different needs, interests and aspirations. Black and white Piedmont residents have more in common with each other than

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[23] Representative Fitch testified: "I don't think all black folks are the same. I don't think they all think alike. And I don't think they all look alike. I don't think they all act alike. There's a difference between a black in Durham [in the Piedmont Urban Crescent] and a black in Warren County or a black in Wilson County [both in the Coastal Plain]." JA 411-12.

their counterparts in the east." JA 574. Likewise, creation of these distinct districts recognizes differences in the historical, cultural and economic traditions of African-American citizens residing in the Coastal Plain and residing in the Piedmont Urban Crescent. As Representative Fitch graphically testified, Districts 1 and 12 allow African-Americans "who wore suits and didn't work in the field" to be "with those who wore suits" and allows those "who wore bib overalls" to be "together with us who wore bib overalls." JA 412.

The fair and effective representation provided citizens through these irregularly shaped but distinctive and homogeneous districts can be quantified. As plaintiffs' expert Dr. O'Rourke acknowledged, voter turnout "certainly would be a measure" of whether a redistricting plan provides fair and effective representation. JA 337. It is a measure because, as Professor Lichtman testified, "the fundamental representative connection between a member of Congress and the residents of a district is voting." JA 479. A sound way to determine the effect of irregularly shaped congressional districts on voter turnout is to compare turnout in congressional elections with turnout in presidential elections. JA 480. Three such comparisons indicate that the irregular configuration of North Carolina's congressional districts has not had an adverse effect on voter turnout. The gap between voter turnout for the 1992 presidential election and 1992 congressional elections in North Carolina was substantially less than the national average; the gap between turnout for 1992 presidential and congressional elections in North Carolina was substantially less than the gap between voter turnout for the 1992 presidential and congressional elections in all neighboring states; and the gap between voter turnout for the 1992 presidential and congressional elections in North Carolina was less than half of the gap between the State's turnout for the 1988 presidential and congressional elections. JA 480-83.

In response to this strong evidence that Districts 1 and 12 provide fair and effective representation, plaintiffs through Dr. O'Rourke theorized only that irregularly shaped districts are not "cognizable" to voters and thus do not provide fair and effective representation for voters.[24] JA 335. This theory seems to have two aspects: (1) that voters are confused by irregularly shaped districts or (2) by the division of counties into two or more congressional districts. At trial, however, Dr. O'Rourke acknowledged (1) that voter turnout for 1992 congressional elections in North Carolina provides no support for the notion that dividing counties reduces voter turnout (JA 341);[25] (2) that he had found no statistically significant relationship between most mathematical measures of geographic compactness and voter turnout (JA 341); and (3) that, in any event, none of his calculations accounted for any of many acknowledged determinants of voter turnout (education, age, income, etc.). Dr. O'Rourke also opined that the relatively low rate at which voters in District 12 recall Congressman Watt's name is evidence of a relationship between irregularly shaped districts and "non-cognizability." That opinion, once again, reflected a failure on Dr. O'Rourke's part to fully analyze data before reaching conclusions. While the recall rate for Congressman Watt in District 12 was relatively low for a first-term congressperson (6%), the recall rate for Congresswoman Clayton (31%) was exceptionally high for a first-term congressperson. A low recall rate for one first-term member of Congress from an irregularly shaped district and an exceptionally high recall rate for another first-term member of Congress from another equally irregularly shaped district does not provide any reasonable basis

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[24] Dr. O'Rourke concedes that any confusion is at its zenith at the first election under a new districting plan and dissipates or disappears with each subsequent election. O'Rourke Dep 85.

[25] The data on which Dr. O'Rourke relied in fact showed that voter turnout was higher in many divided counties. JA 338-40.

for inferring any relationship between irregularly shaped districts and recall rates.[26] JA 490.

SUMMARY OF ARGUMENT

The Court should uphold North Carolina's congressional redistricting plan. Substantial and largely unrefuted evidence reveals that the General Assembly applied rational redistricting principles in the context of historic, geographic and socio-economic circumstances to build a plan that provides fair and effective representation for all the State's citizens, white and African-American alike. Geographic compactness was sacrificed in building the plan but its purpose, providing accessibility between voters and their elected representatives, was maintained through the concept of functional compactness.

There are three separate grounds for upholding this rational plan. First, on the issue of standing the plaintiffs failed to prove personal injury resulting to them by the construction of Districts 1 and 12. No plaintiff resides in District 1; therefore, under *United States v. Hays*, 115 S. Ct. 2431 (1995), none of the presumptive personal injury resulting from residence in a district constructed in reliance on racial criteria has been visited upon them. Two plaintiffs do reside in District 12, but their claim that they suffered personal injury by their residence within the District was dispelled by proof that the plan was constructed to provide, and does provide, fair and effective representation for all citizens and does not cause stigmatic or representational harms to plaintiffs.

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[26] An article published by Professor Niemi provides the likely explanation for this difference in recall rates. In that article Professor Niemi found that "levels of candidate recall and recognition are extremely low in non-competitive races." Niemi Dep Ex 6 at 191; *see also* JA 490. The 1992 general election for the seat held by Representative Watt was non-competitive. By contrast, the two primaries and general election in 1992 for the seat held by Representative Clayton were all competitive.

Second, the legal test applied by the District Court to determine whether plaintiffs had carried their threshold burden of proving a racial gerrymander ("race-a-motivating-factor" test) inappropriately restricted the broad "discretion" and "presumption of good faith" necessarily accorded legislature's in resolving the "complex interplay of factors that enters a legislature's redistricting calculus." *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995). The correct test is whether plaintiffs proved that race was "the predominant factor" motivating the line drawing process and that rational districting principles were "subordinated" to racial considerations. *Id.* Had the District Court applied this test to its findings of fact, it would have held for defendants. The District Court did not find that race was "the predominant factor" motivating the line drawing process. To the contrary, the District Court found that the General Assembly gave "primacy" to three factors ("equal population," "majority-minority imperatives" and "the creation of districts with distinctive and internally homogeneous communities of interest") in the line drawing process.

Third, the District Court correctly applied this Court's decisions in evaluating the evidence and concluding that the General Assembly had compelling interests in complying with the Voting Rights Act and that the plan was narrowly tailored to achieve those interests. Plaintiffs' challenges to the District Court's findings of fact and its legal analysis are unfounded.

The legal analysis applied by District Court in strictly scrutinizing Districts 1 and 12 conforms to this Court's decisions. The focus of the compelling interest inquiry is not whether the General Assembly had a compelling interest in creating Districts 1 and 12 with all their twists and turns, but rather whether the General Assembly had a compelling interest in adopting any plan with two majority districts. If legislative bodies must establish a compelling interest in particular enacted majority-minority districts, "strict in theory" will become "fatal in fact," *Adarand Constructors, Inc. Pena*, 115 S. Ct. 2097, 2117 (1995), and the broad

discretion necessarily accorded legislative bodies in drawing electoral districts will become hollow. *Miller*, 115 S. Ct. at 2488. The District Court also correctly concluded that a districting plan is narrowly tailored if it is based on rational districting principles selected and utilized by the General Assembly and that narrow tailoring should not be resolved by reference to particular principles, like geographic compactness, advocated by those who challenge plans. To require that a plan be narrowly tailored to comply with some criteria favored by some persons that sometimes provide for fair and effective representation, like geographic compactness, would usurp the discretion accorded legislative bodies in drawing electoral districts and thwart their efforts to find solutions to society's most intractable problems.

The District Court's findings of fact supporting its conclusions regarding the State's compelling interest in complying with the Voting Rights Act and its narrow tailoring of Districts 1 and 2 to achieve those interests are likewise well-founded. Those findings may not be set aside unless they are clearly erroneous, *see, e.g.*, *Miller*, 115 S. Ct. at 2489, and *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). An examination of the record reveals that those findings are supported by substantial evidence, and in many cases by unrefuted evidence.

ARGUMENT

I. JUDGMENT FOR THE STATE SHOULD BE AFFIRMED BECAUSE UNDER PROPER LEGAL STANDARDS PLAINTIFFS FAILED TO PROVE THEY HAD STANDING TO PURSUE THEIR CLAIM.

The District Court struggled with whether plaintiffs had proved their standing to challenge Districts 1 and 12. It ultimately concluded:

> Any person registered to vote in a jurisdiction with a districting plan that contains one or more districts which have been deliberately designed to have a certain racial composition has standing to challenge the plan, even if he is not assigned to vote in one of those districts himself.

Shaw v. Hunt, 861 F. Supp. 408, 426-27 (1994); Appendix to Jurisdictional Statement (hereinafter JS App) at 25a-26a. In reaching this conclusion, the District Court rejected a requirement that "a plaintiff seeking to challenge a race-based redistricting plan demonstrate that it caused some sort of concrete and material injury to his political interests." 861 F. Supp. at 426, n.13; JS App at 25a. We now know from this Court's decision in *United States v. Hays*, 115 S. Ct. 2431 (1995), that the District Court's legal analysis of the standing issue was incorrect.

"[E]ven if a governmental actor is discriminating on the basis of race, the resulting injury 'accords a basis for standing only to "those persons who are *personally* denied equal treatment" by the challenged discriminatory conduct.'" *Hays*, 115 S. Ct. at 2435 (emphasis added). In the electoral districting context, *Hays* appears to establish three guidelines for determining whether plaintiffs have carried their burden of proving personal injury sufficient to establish their standing to challenge a district. First, "stigmatic" or "representational" injuries are ordinarily sufficient to establish standing. Second, such injuries are typically suffered only by plaintiffs who physically reside within a district constructed in "reliance on racial criteria." Third, "absent specific evidence" to the contrary, "stigmatic" or "representational" injuries do not exist for plaintiffs who do not reside within a challenged district. *Id.* at 2436.

Application of these guidelines to the evidence establishes that plaintiffs do not have standing to challenge either District 1 or 12. No plaintiff or plaintiff-intervenor resides in challenged District 1. Under *Hays* then, plaintiffs do not have standing to

challenge District 1 "absent specific evidence" of some "stigmatic" or "representational" injury flowing to them because racial criteria were used in constructing a district in which they do not reside. The record is devoid of such evidence. No plaintiff, and no witness, offered any evidence that any plaintiff suffered any personal injury as a consequence of the construction of District 1.

Two plaintiffs (Ruth Shaw and Melvin Shimm), but no plaintiff-intervenors, are residents of the other challenged district, District 12. Under *Hays*, this residence may be sufficient to establish these two plaintiffs' standing to challenge District 12. Substantial evidence, however, demonstrates that this is a case where the mere residence of Ms. Shaw and Mr. Shimm in District 12 is not sufficient to prove "the fact of personal injury" through the General Assembly's "reliance on racial criteria." 115 S. Ct. at 2436-37. First, they failed to prove that racial considerations caused them to be placed in District 12. Ms. Shaw and Mr. Shimm reside in the City of Durham located at the eastern end of the Piedmont Urban Crescent. A specific and primary motivation of the General Assembly in constructing District 12 was to create an urban district spanning the Piedmont Urban Crescent grouping together white and African-American citizens alike with shared interests, concerns and needs. It was this motivation, not the motivation to comply with the Voting Rights Act, that resulted in their placement in District 12. Second, Ms. Shaw and Mr. Shimm offered no proof of their allegation that District 12 "threatens to perpetuate archaic racial stereotypes and to increase racial divisions in society." 861 F. Supp. at 424; JS App at 22a. To the contrary, the evidence before the District Court established that District 12 was established by the General Assembly to avoid racial stereotyping and to decrease racial divisions (1) by recognizing that the interests, concerns and needs of African-American citizens in District 12 located in the Piedmont Urban Crescent and in District 1 located in the Coastal Plain are not fungible; (2) by recognizing that white and African-American citizens in the Piedmont Urban Crescent have more in common with each other than their

counterparts in the Coastal Plain; and (3) by recognizing the belief of legislators that opportunity districts tend to ameliorate racially polarized voting. Third, Ms. Shaw and Mr. Shimm offered no evidence of concrete harm to their representational interests. Ms. Shaw, who voted for Representative Watt, testified: "I would think that the majority of the time, yes, [Representative Watt] would represent me." JA 679. Mr. Shimm, who voted for the Durham opponent of Mr. Watt in the primary and for Mr. Watt in the general election, testified to his high regard for Representative Watt's abilities. JA 540; Shimm Dep 9. He also testified to efforts by the Durham County Board of Elections to eliminate any confusion on the part of voters about the district in which they resided. JA 538. Mr. Shimm did express a concern that Representative Watt would only represent his African-American constituents, and not all his constituents. That concern was based on a statement by Representative Watt, which had been taken out of context, that he would not "cater to" the white business community. Refusing "to cater" to anyone hardly equates to failure to represent. At trial, Representative Watt explained the manner in which he performs his duties by reference to his response to a question from a member of the white banking community: "I will consider your opinion, I will listen to you, I will allow you to persuade me, and if I believe that you are right, I will vote with you." JA 511-12. This is the essence of representation.

II. JUDGMENT FOR THE STATE SHOULD BE AFFIRMED BECAUSE UNDER PROPER LEGAL STANDARDS THE PLAINTIFFS FAILED TO PROVE THAT RACE WAS THE PREDOMINATE FACTOR APPLIED IN DRAWING DISTRICTS 1 AND 12.

The District Court concluded that plaintiffs had carried their burden of proving that the General Assembly's consideration of race in assigning voters to districts was sufficient to trigger strict scrutiny. In reaching this conclusion the District Court did

not have the benefit of this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), and applied an incorrect legal standard. Had the District Court applied the correct standard to its findings of fact it would have entered judgment for defendants without reaching strict scrutiny.

In addressing the threshold issue of legislative motivation, the District Court determined that strict scrutiny is triggered by proof that "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process" and that this standard is "necessarily met by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have played a significant role in the precise location and shape of those districts." 861 F. Supp. at 431; JS App at 34a. This test is flawed in two respects.

First, the District Court's test inappropriately restricted the broad "discretion" and "presumption of good faith" federalism accords legislature's in creating electoral districts and in resolving the "complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 115 S. Ct. at 2488. The District Court's test also failed to account fully for Congress' commands to the states under Section 5 of the Fourteenth Amendment and through the Voting Rights Act to consider race in the redistricting process. Proof that race was deliberately considered and that race was one of only several factors substantially motivating the line-drawing process does not sufficiently account for these state interests and congressional commands, and will not suffice to trigger strict scrutiny. A higher standard of proof is required. "The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial consider-

ations" in drawing the districts. *Id.* at 2488.[27] This is a "demanding" standard. *Id.* at 2497 (O'Conner, J., concurring). *See also Dewitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), *aff'd*, 115 S. Ct. 2637 (1995) (strict scrutiny not triggered where plan "sought to balance the many traditional redistricting principles, including the requirement of the Voting Rights Act").

Second, the focus of the District Court's motivational inquiry was the General Assembly's decision *whether* to create two majority-minority districts; not its decisions about *how* to draw those districts. This focus is illustrated by the District Court's ultimate finding of fact that the General Assembly "deliberately *created* two districts" in order to comply with the Voting Rights Act. 861 F. Supp. at 473; JS App at 108a.[28] (emphasis added)

A decision to create majority-minority districts is not, and cannot be, inherently constitutionally infirm for such a decision on its face reflects nothing more than an intention to attempt to comply with federal law. Such an intention is surely not suspect. Under *Miller* a decision to create majority-minority districts becomes potentially infirm and subject to strict scrutiny only if

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[27] This standard tracks the standard applied by the District Court in *Miller*. In arriving at that standard the District Court there criticized the standard adopted by the District Court here because it was not sensitive to the discretion necessarily accorded legislatures in drawing electoral districts or "the race-saturated requirements of the Voting Rights Act." *Johnson v. Miller*, 864 F. Supp. 1354, 1373 (1994).

[28] The District Court's focus on the decision whether to draw two districts, rather than how the districts were drawn, is likewise illustrated by its identification of "whether the congressional redistricting Plan reflects a legislative intent deliberately to include one or more districts having a particular racial composition" as one of the two "dispositive legal issues" before it. 861 F. Supp. at 440, n.54; JS App at 84a. The dispositive issue is not whether the General Assembly decided to "include" two districts but how it implemented that decision. Plaintiffs likewise focus in their briefs in this Court on the issue of whether to create districts, not how they were drawn. *See, e.g.*, their reference to the State's purported concession at oral argument in *Shaw I* that the "General Assembly intentionally created two majority-minority congressional districts." P Br at 4, 27.

race predominates over traditional redistricting criteria in the implementation of the decision to create the districts. If the law were otherwise, every decision by a legislative body to create majority-minority districts would be subjected to strict scrutiny even if traditional redistricting criteria were used to carry out that decision and even though the districts actually drawn fully provided fair and effective representation for all citizens.

It is clear from the evidence before the District Court that race was not "the predominant factor" motivating the line drawing process and that "race-neutral districting principles" were not "subordinated" to racial considerations in that process. Instead, the evidence unequivocally establishes that the line drawing process was motivated by six factors operating in tandem: (1) an intention to meet one-person, one-vote requirements; (2) an intention to comply with the Voting Rights Act; (3) an intention to create a poor, largely rural district entirely located within the Coastal Plain with its distinctive historical, cultural and economic traditions; (4) a mirror intention to create an urban district entirely located within the Piedmont Urban Crescent with its distinctive historical, cultural and economic traditions; (5) the protection of incumbents of both parties; and (6) the political interests of Democrats. That these motivations working together produced Districts 1 and 12 is manifest from the transcripts of the General Assembly's proceedings, the testimony of legislative leaders and the testimony of the draftsman of the plan, Mr. Cohen. That the motivation to draw a rural Coastal Plain District 1 and an urban Piedmont Urban Crescent District 12 was not a mask for race, but in fact conforms to the State's history, geography and demography, is manifest from the testimony of citizens, legislators, and experts alike.[9] That protection of incumbents was a major factor in drawing lines

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[9] As the District Court observed: "That [the districts] are distinctively 'rural' and distinctively 'urban' in character is a fact so much within the common knowledge of intelligent inhabitants of the state that it probably is subject to judicial notice." 861 F. Supp. at 470; JS App at 102a.

is clear from the legislative history and the testimony of Mr. Cohen. Finally, that politics was a primary factor causing the location and shapes of Districts 1 and 12 is manifest from the statements and sworn testimony of Republicans, including most vividly the sworn testimony of Representative Arthur Pope, a plaintiff-intervenor in this case,[30] that politics drove the redistricting process. JA 520-37.[31]

The only districting principles "subordinated" in the line drawing process were geographical compactness and adherence to county and municipal boundaries, but they were sacrificed, as the District Court found, without any harm to the aim of redistricting, providing all citizens fair and effective representation. 861 F. Supp. at 475; JS App at 112a-114a. Districts 1 and 12 are distinctive integrated districts grouping together citizens of both races with common problems, concerns and needs. Significantly, those districts also recognize and account for the very different experiences, needs and desires of white and African-American citizens in the Piedmont Urban Crescent and the Coastal Plain.

It is likewise clear from the District Court's evaluation of the evidence that had the District Court applied the *Miller* standard it would have found for defendants. The District Court did not find "that race was the predominant factor motivating the legislature's decision" or that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller*, 115 S. Ct. at 2488. To the contrary, the District Court in

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[30] Representative Pope was also the lead plaintiff in a suit in which he unsuccessfully claimed that the State's congressional plan constituted an unlawful political gerrymander. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 506 U.S. ___, 113 S. Ct. 30 (1992).

[31] Plaintiffs can find no solace in an argument that it should be inferred that race had predominant weight. Where "conflicting inferences" may be drawn from evidence regarding legislative motivation in drawing districts, that evidence is not sufficient to carry plaintiffs' burden of proof. *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964), *cited in Miller*, 115 S. Ct. at 2489.

its ultimate findings of fact concluded that the location and shapes of Districts 1 and 12 resulted from the interplay among six factors and that among these six factors the most important were "equal population," "majority-minority imperatives" and "the creation of districts with distinctive and internally homogeneous communities of interest." 861 F. Supp. at 473; JS App at 109a. The District Court further found that the General Assembly gave "primacy" to these factors in drawing districts and that in giving them primacy the General Assembly chose only to subordinate two redistricting criteria not required by the Constitution, geographic compactness and adherence to county and city boundaries. Finally, the District Court found that sacrificing these criteria had not "demonstrably affected adversely the fair and effective representation" of the citizens. *Id.*

In *Miller*, the Court held that a "State's districting legislation [cannot] be rescued by mere recitation of purported communities of interest." 115 S. Ct. 2490. Unlike Georgia, North Carolina has proved by overwhelming evidence that Districts 1 and 12 are distinctive districts deliberately designed to encompass citizens of all races who share historic, economic and social concerns and interests relevant to Congress' role.

III. JUDGMENT FOR THE STATE SHOULD BE AFFIRMED BECAUSE DISTRICTS 1 AND 12 ARE NARROWLY TAILORED TO SERVE THE STATE'S COMPELLING INTERESTS IN COMPLYING WITH THE VOTING RIGHTS ACT.

Carefully analyzing this Court's decisions and the extensive evidence before it, the District Court held: "The state has adequately established that it had a 'compelling interest' in enacting a race-based congressional redistricting plan, by demonstrating that it had a 'strong basis in evidence' for concluding that such action was necessary to bring its existing congressional redistricting scheme into compliance with §§ 2 and 5 of the Voting

Rights Act." 861 F. Supp. at 474; JS App at 111a.[32] The District Court further held: "The state has adequately established that the Plan creating the two remedial districts was 'narrowly tailored' to serve the compelling interests" in bringing the state into compliance with Sections 2 and 5. *Id.* at 475; JS App at 113a. The District Court's holding is in accord with this Court's decisions and is fully supported by the evidence.

A. THE DISTRICT COURT PROPERLY ALLOCATED THE BURDEN OF PRODUCTION AND THE BURDEN OF PERSUASION BETWEEN THE PARTIES.

The District Court established a three-part process for allocating the burdens of production and persuasion between the parties. First, the burdens of production and persuasion rested with plaintiffs to prove that the General Assembly engaged in race-based districting. Second, upon such proof, the burden of production, but not the burden of persuasion, shifted to defendants to come forward with evidence demonstrating that the districting plan was narrowly tailored to achieve one or more compelling interests. Third, upon defendants production of such evidence, plaintiffs assumed the ultimate burden of persuading the court that those interests were not compelling or that the plan was not narrowly tailored to achieve them. 861 F. Supp. at 435-36; JS App at 42a. Plaintiffs concede that they had the burdens of production and persuasion on the threshold issue, but contend that once they proved race-based districting, both the burden of production and persuasion shifted to defendants to prove that the plan was narrowly tailored to achieve compelling interests.

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[32] The District Court also held that a state potentially has a compelling interest independent of the Voting Rights Act in eradicating "the effects of identified past or present racial discrimination in its own political processes." 861 F. Supp. at 444; JS App at 56a, but that the sentiment in the General Assembly to act on that basis "was not sufficient in voting power to have caused the legislative action independent of the perceived compulsion of the Voting Rights Act." *Id.* at 473; JS App at 108a.

Plaintiffs' argument is not supported by the law and reflects confusion between the standard of review and their ultimate burden of proof. "Strict scrutiny" is the "most rigorous and exacting standard of constitutional review." *Miller*, 115 S. Ct. at 2490. Nevertheless, "[t]he ultimate burden [of proof] remains" with the plaintiffs "to demonstrate the unconstitutionality of an affirmative-action program." *Wygant v. Jackson*, 476 U.S. 267, 277-78 (1986); *id.* at 292 (O'Connor, J., concurring) ("In 'reverse discrimination' suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated."). *See also Karcher v. Daggett*, 462 U.S. 725, 760 (1983) (Stevens, J., concurring) (State "may adduce 'legitimate considerations incident to the effectuation of a rational state policy'" for adoption of a districting plan and if such evidence is produced it will "overcome a prima facie case of invalidity.").

Plaintiffs' argument also confuses the difference between the burden of production (the burden of "showing" or of "demonstrating") and the burden of persuasion. Thus, their reliance on *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) ("to satisfy strict scrutiny, the state must show"), *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("burden shifts to the law's defenders to demonstrate"), *In re Griffiths*, 413 U.S. 717, 721 (1973) ("to justify the use of a suspect classification, a State must show") and other similar cases is entirely misplaced.

Strong policies undergird imposing the ultimate burden of persuasion on plaintiffs claiming that race-based districting plans are not narrowly tailored to achieve compelling remedial interests. Principles of federalism, the need to assure that legislative bodies have the discretion to balance many competing interests and evidentiary difficulties, require "courts to exercise *extraordinary* caution when adjudicating claims that a state has drawn district lines on the basis of race." *Miller*, 115 S. Ct. at 2488 (emphasis added). Allocating the ultimate burden of persuasion on plaintiffs helps assure that "extraordinary caution" is exercised.

B. The District Court Correctly Found and Concluded that the State Had a Compelling Interest in Creating a Plan Containing Two Majority-Minority Districts in Order to Comply with the Voting Rights Act.

Race-based legislative actions, once proven, must be strictly scrutinized to assure that "benign" or "remedial" classifications are not "in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Shaw v. Reno*, 113 S. Ct. at 2824, *quoting Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality). But "strict in theory" is not necessarily "fatal in fact" for the "government is not disqualified from acting in response" to "the persistence of both the practice and lingering effects of racial discrimination against minority groups in this country." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995).

Strict scrutiny requires that legislative bodies have a "strong basis in evidence" before undertaking race-based remedial actions. *Miller*, 115 S. Ct. at 2491. However, that "strong basis in evidence" need not be reflected in explicit legislative findings or preceded by judicial determinations. *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277-78. A legislative body has a "strong basis in evidence" for engaging in remedial action where it has information sufficient to conclude that a *prima facie* violation of the Constitution or federal laws could be established unless it acts. *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 292 (O'Conner, J., concurring).

These principles were applied by the District Court, 861 F. Supp. at 436-43; JS App at 42a-54a, in evaluating the extensive evidence, *id.* at 457-72; JS App at 78a-108a, and in ultimately finding that the General Assembly "deliberately created" Districts 1 and 12 "in order to comply with §§ 2 and 5 of the Voting Rights Act, on the basis of the well-founded belief of a sufficient majority

of its membership that failure to do so would, or might well, violate one or both of those provisions." *Id.* at 473; JS App at 108a. Plaintiffs' challenges to these findings and conclusions will not withstand analysis.

Plaintiffs first claim that *Miller* precludes defendants reliance on Section 5 of the Voting Rights Act, but *Miller* does not hold that Section 5 can never serve as a compelling interest for redistricting decisions, 115 S. Ct. at 2490-91. It only holds that redistricting decisions made solely in response to the Department of Justice's Section 5 "maximization policy" cannot. *Id.* at 2492. This policy was not at work in North Carolina. While North Carolina's African-American population is 22%, the Department refused to preclear a plan creating one majority-minority district out of twelve (8.3%) and only pointed to the potential for the creation of two such districts (16.7%), despite the existence of one plan which would have created three such districts (25%). Thus, the Department's actions in North Carolina are not indicative of the condemned maximization policy at work in Georgia. It is true that some North Carolina legislators perceived the Department's actions as politically based and intended to create "quotas." JA 197. Others, however, perceived only that the Department was concerned that one majority-minority district as a matter of fairness was not proportional to the State's African-American population. Cohen Dep 41. Rough proportionality is a relevant inquiry under the Voting Rights Act. *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2658 (1994); *Rural West Tennessee Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1108 (W.D. Tenn 1995) (three-judge court), *aff'd*, 64 U.S.L.W. 3238 (U.S. Tenn. Oct. 2, 1995). Moreover, given the irregular shapes of districts in the first plan, the Department's determination that incumbency protection appeared to be serving as a mask for vote dilution in North Carolina was surely cause for careful reevaluation. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir., 1990), *cert. denied*, 498 U.S. 1028 (1991) (finding that incumbency protection was a vehicle for intentional vote dilution). The "troubling and difficult

constitutional questions" associated with Section 5, *Miller*, 115 S. Ct. at 2493, however, need not be resolved in this case. It is clear, as the District Court found, that the General Assembly had an independent compelling interest in complying with Section 2 of the Voting Rights Act. It is likewise clear that plaintiffs' Section 2 arguments are not well-founded.

Plaintiffs argue that the General Assembly was not motivated by Section 2 of the Voting Rights Act in deciding to create two districts. That argument suffers three flaws. First, their argument amounts only to a claim that remedial action by a legislative body must be supported by an explicit finding of the basis for the action. Such a rule, however, has been rejected by this Court because it "would severely undermine" any incentive to comply voluntarily with federal discrimination laws contrary to the "Court's and Congress' consistent emphasis on . . . the value of voluntary compliance." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). Second, the District Court's finding that the "dominant concern driving the decision" to create two majority-minority districts was the perception that any plan "which did not contain at least two majority-minority districts, would in fact violate the Voting Rights Act," 861 F. Supp. at 463; JS App at 90a, is reviewable only under the clearly erroneous rule. *See Miller*, 115 S. Ct. at 2488-89 (applying clearly erroneous rule to finding of legislative intent); *Voinovich v. Quilter*, 507 U.S. ___, 113 S. Ct. 1149, 1159 (1993) (same); and *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S. Ct. 2742, 2756 (1993) (applying rule to ultimate finding of discrimination). Finally, the record is replete with evidence supporting the District Court's finding. For example, (1) from the beginning compliance with "the Voting Rights Act of 1965, as amended" was a goal of the General Assembly, JA 50; (2) throughout the districting process, particularly in January, 1992, *Gingles*, and the elements of a *Gingles'* claim (polarized voting, cohesiveness, compactness, proportionality), were debated JA 195, 211-20, 223-36, 236-37, 258-61, 263-64); and (3) at trial Representative Fitch, Co-Chairman of the House

Redistricting Committee, testified that he believed two majority-minority districts were required by the Voting Rights Act. JA 425.

Plaintiffs' argument that the State's vigorous defense of its first plan in a memorandum to the Department of Justice in October, 1991, belies any motive to comply with Section 2 is based on a truncated view of the facts.[33] Subsequent events, particularly the Justice Department's December, 1991, decision to reject the first plan required the General Assembly to reevaluate its original plan and it is that reevaluation that led the General Assembly to conclude that two districts were required by Section 2. Surely, a state's vigorous but unsuccessful defense of a districting plan in a Section 5 context does not preclude the state from reevaluating its position with respect to compliance with Section 2. Indeed, in this case the concerns raised by the Department in denying preclearance (lack of proportionality and intentional discrimination) are directly pertinent to a Section 2 claim. *See* JA 147-54.

Plaintiffs also argue that the bizarre shapes of Districts 1 and 12 preclude the defendants from establishing a "strong basis in evidence" for believing that the failure to draw a second district would have violated the *Gingles'* geographic compactness requirement. They have the proverbial "cart in front of the horse." At the compelling interest stage of analysis "the critical question . . . is not whether the state has a compelling interest in enacting the *particular* race-based redistricting plan . . . but whether it had a

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[33] Their reliance on *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) to support this argument similarly reflects a truncated view of the law. *Weinberger* holds only that asserted legislative purposes are not shielded from "any inquiry" and will not be accepted "at face value." *id.* Thus, for example, an avowed purpose to remedy discrimination against females by providing preferential admissions for females to largely female nursing programs will not be accepted. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982). The *Weinberger* rule plainly has no application to North Carolina's decision to create two remedial majority-minority districts.

compelling interest in enacting *any* race-based redistricting plan." 861 F. Supp. at 437; JS App at 43a-44a.[34] Under the rule advocated by plaintiffs, "strict in theory" would become "fatal in fact" for it is doubtful that any state could ever show that it has a compelling interest in the twists and turns of any particular majority-minority districts. Likewise, such a rule would read out of the districting process the broad "discretion" principles of federalism afford the states in resolving the "complex interplay of forces that enter a legislature's redistricting calculus," *Miller*, 115 S. Ct. at 2488, and would force all states, particularly southern states, to apply no criteria in constructing districts except *Gingles'* criteria. In particular, such a rule would deny a state the discretion to select the rational districting principles that may better resolve intractable social problems and would forbid a state from constructing functionally compact majority-minority districts encompassing citizens, whites and African-Americans alike, who share common historical, economic and social interests.

The proper question at the compelling interest stage of analysis in this case, therefore, is whether the General Assembly had a "strong basis in evidence" for concluding that a *prima facie* violation of the *Gingles'* compactness requirement could likely be established if it failed to create a plan containing two majority-minority districts.[35] The District Court specifically addressed this issue and found: "The overwhelming evidence established that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts." 861 F. Supp. at 464; JS App at 93a.

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[34] The characteristics of the particular plan are examined during the narrowly tailored stage of analysis "which examines the 'fit' between the compelling state interest and the precise means chosen by the state to accomplish it." 841 F. Supp. at 437; JS App at 44a.

[35] Plaintiffs and plaintiff-intervenors have never seriously contended that failure to create one majority-minority district would not have resulted in a *prima facie* violation of Section 2.

This finding of fact is reviewable only under the clearly erroneous rule. *Gingles*, 478 U.S. at 78-79 (because proof of the elements of a Section 2 claim "is peculiarly dependent upon the facts of each case" and requires "an intensely local appraisal" of the evidence, findings of fact regarding those elements are only "reviewable under Rule 52(a)'s clearly erroneous standard.") Similarly, the District Court's finding should be accorded substantial deference because "geographic compactness" has no fixed legal meaning. It is a relative concept which should be resolved by a functional approach focusing on accessibility and which should not be resolved by mechanically applying mathematical tests or aesthetic values. *See Jeffers v. Clinton*, 730 F. Supp. 196, 207 (1989) (three-judge court), *aff'd*, 498 U.S. 1019 (1991); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1053 (D. Md. 1994) (three-judge court); *Clark v. Calhoun County*, 21 F.3d 92, 95-96 (5th Cir. 1994).

The District Court's finding of fact, in any event, is fully supported by the record. In 1991, two plans were prepared by Representative Balmer creating two majority-minority districts. Exs 10F and J (maps lodged with the Court). While these majority-minority districts did not fulfill other legitimate State interests, the majority-minority districts in those plans, and the plans as a whole, are relatively geographically compact as compared to many of the districts in the first plan. In January, 1992, Representative Justus reintroduced a plan creating two majority-minority districts constructed using geographic compactness as a criterion and labeled "Compact 2 Minority Plan." Ex 10N (map lodged with the Court). While incumbent protection had been disregarded and rural and urban areas indiscriminately mixed in the construction of the plan, the majority-minority districts and the plan as a whole are reasonably geographically compact. Most strikingly, at trial plaintiffs through their expert witness, Dr. Hofeller, introduced two plans for the purpose of demonstrating that "there exists a . . . more compact solution for the minority districts in North Carolina." JA 318. *See also* JA

309. These plans, though flawed in other respects, are geographically compact to the eye. *See* JA 555 (map of "*Shaw II*") and Ex 301, Map 3 (lodged with the Court) (map of "*Shaw III*"). These plans together surely provided the General Assembly a "strong basis in evidence" for believing that the *Gingles'* compactness requirement could be met in a variety of ways if the first plan were challenged. Furthermore, the evidence in this case demonstrates that the interest in assuring accessibility between voters and their representatives is better advanced by creating functionally compact districts than by drawing mathematically or aesthetically compact districts. Districts 1 and 12 are not geographically compact in a mathematical or aesthetic sense but the strong communities of interest in both districts and communication systems within the districts provide for the accessibility important to fair and effective representation.[36]

C. THE DISTRICT COURT PROPERLY FOUND AND CONCLUDED THAT DISTRICTS 1 AND 12 ARE NARROWLY TAILORED TO ACHIEVE THE STATE'S COMPELLING INTEREST IN COMPLYING WITH THE VOTING RIGHTS ACT.

Plaintiffs contend that the District Court's findings and conclusions that Districts 1 and 12 were narrowly tailored to achieve the State's compelling interest in complying with the Voting Rights Act are erroneous in two respects. Their first

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[36] Plaintiffs also suggest in their briefs that the General Assembly did not have a "strong basis in evidence" for believing that the racially polarized voting requirement of *Gingles* could be met. This argument ignores the unrebutted testimony of Professor Richard Engstrom, an expert in racially polarized voting analysis. Based on an analysis of fifty biracial congressional, statewide and legislative elections in 1988, 1990 and 1992, he concluded: "Racially polarized voting occurs across the state, and across types of elections. The polarized voting found in *Thornburg v. Gingles* is not a phenomenon of the past; it remains prevalent in the state today." JA 596-97. Similarly, it is unrefuted that the Senate Report factors relevant to establishing the totality of circumstances which constitutes a Section 2 violation, *Gingles*, 478 U.S. at 44-45, exist in North Carolina. *See e.g.* JA 294-99.

contention is that the District Court made a legal error when it allegedly eliminated from its narrow tailoring analysis any consideration of traditional redistricting principles like compactness, contiguity and adherence to political boundaries. Their second contention seems to be that the District Court's findings of fact do not support its conclusion that the plan was narrowly tailored, primarily because plaintiffs do not see a "fit" between potential Section 2 violations and Districts 1 and 12. Both arguments should be rejected.

The argument that the District Court eliminated traditional redistricting principles from its narrow tailoring analysis is, in the first instance, not accurate. Instead of focusing, as the plaintiffs wanted, on some of the factors that sometimes serve as a means for providing fair and effective representation (geographic compactness, contiguity and adherence to political boundaries) the District Court focused on whether the challenged plan specifically was "grounded in rational districting principles which ensure that all citizens receive 'fair and effective representation.'" 861 F. Supp. at 454; JS App at 740. *See also id.* at 450; JS App at 67a. (*Shaw* requires that a race-based redistricting plan "like any other redistricting plan, must employ *rational* districting principles that ensure fair and effective representation to all citizens.") (emphasis in original). Thus, the District Court specifically included consideration of sound redistricting criteria in its narrow tailoring analysis. What it did not do is resolve the narrow tailoring analysis on the criteria selected by the plaintiffs. It resolved that issue on the criteria selected and actually utilized by the General Assembly.

The District Court's analysis is sound and logical. First, as the District Court observed, this Court "has repeatedly rejected claims that a state redistricting plan violates the Equal Protection Clause because it sacrifices [compactness or attractiveness] in order to achieve other legitimate redistricting objectives, such as protecting incumbents, preserving the integrity of established

neighborhoods, and recognizing the voting strength of various political parties." 861 F. Supp. at 449; JS App at 65a. Second, as plaintiffs' own experts testified, there is no consensus among experts that compactness, even if it can be defined, is in any respect necessary to providing fair and effective representation. Niemi Dep 83; O'Rourke Dep 89-93. *See also Reynolds v. Sims*, 377 U.S. 533, 580 (1964). Third, "the 'narrowly tailored' inquiry suggested by plaintiffs would result in undue interference by the federal judiciary in matters that have long been thought to be the primary province of the state legislatures." 861 F. Supp. at 453; JS App at 72a. "It is one thing to tell the states that the Voting Rights Act does not give them license to engage in race-based redistricting . . . [b]ut is another thing entirely to tell a state which *does* have a substantial basis for concluding that it must engage in race-based redistricting . . . that it can do so only if it draws districts whose lines are sufficiently 'regular' or 'pleasing' in their appearance to satisfy the aesthetic sensibilities of a handful of unelected federal judges." *Id.* at 454; JS App at 73a-74a.

Applying these sound and logical principles to Districts 1 and 12 the District Court carefully and thoroughly reviewed the evidence, 861 F. Supp. at 467-72; JS App at 97a-108a, and concluded that the districts "though highly irregular in shape and relatively non-compact geographically, are nonetheless based on rational districting principles that ensure fair and effective representation to all citizens." 861 F. Supp. at 475; JS App at 113a-114a. Those principles, as the District Court found, were "incumbent protection" and "the creation of districts with distinctive and internally homogeneous communities of interest." 861 F. Supp. at 473; JS App at 109a. Plaintiffs do not, and cannot, claim that these are not "rational districting principles" or that the General Assembly did not apply them in constructing the districts. Moreover, with regard to plaintiffs' concern that the majority-minority districts do not remedy potential Section 2 violations, the District Court appropriately concluded that the districts are "generally located in areas of the state where violations of the

Voting Rights Act have occurred." 861 F. Supp. at 472; JS App at 107a.

Plaintiffs' challenges to the District Court's findings that the plan is not narrowly tailored are likewise unfounded. To begin with, the District Court's findings of fact in this regard, like its other findings of fact, are only reviewable under the clearly erroneous rule. *See Miller*, 115 S. Ct. at 2489; *Gingles*, 478 U.S. at 79.[37] In any event, the District Court's findings are plainly supported by the evidence. The plan demonstratively does not harm the legitimate expectations of innocent parties; it in fact serves to provide fair and effective representation for all citizens, especially as compared with alternative plans that indiscriminately mixed urban and rural areas and the Piedmont Urban Crescent and the Coastal Plain. The plan creates only two majority-minority districts out of twelve (16.7%) in a state whose African-American population is 22%. *Cf. DeGrandy*, 114 S. Ct. at 2658 (proportionality is one measure of vote dilution). It is a temporary plan which only provides African-Americans a reasonable opportunity to elect candidates of their choice through the creation of two barely majority-minority districts, and which does not establish a "quota." *See DeGrandy*, 114 S. Ct. at 2665 (Kennedy, J., concurring) ("The assumption that majority-minority districts elect only minority representatives . . . is false as an empirical matter."). *See also* 861 F. Supp. at 472; JS App at 108a (Election of three whites in State legislative majority-minority districts created pursuant to *Gingles* demonstrates narrow voting majorities do not assure election of minority candidates.). Finally, Districts 1 and 12 encompass areas of the State where voting rights violations have occurred and racially polarized voting persists. In District 1 Professor Engstrom's analysis of the biracial 1992 congressional first primary, second primary and general election revealed that

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[37] Plaintiffs apparently concede that these findings are only subject to review under the clearly erroneous standard. P Br at 42.

votes in all these elections split clearly along racial lines. JA 577-579.[38] The 1992 congressional election in District 12 was not biracial. There were, however, biracial legislative elections in 1988, 1990 or 1992 in four District 12 counties (Mecklenburg, Guilford, Orange and Durham) all of which revealed polarized voting, JA 586-591; Ex 404, Tables 3A-5C. Similarly, in four District 12 counties (Guilford, Forsyth, Davidson and Iredell) post-*Gingles*' Section 2 litigation required changes in local electoral systems. Keech Dep Ex 2, Tables 8B, 9A, 9B. Also, two District 12 counties (Gaston and Guilford) are covered by Section 5. Stip Ex 195. *See* 861 F. Supp. at 472; JS App at 107a. Thus, it was established that racially polarized voting persists in the eight of the ten District 12 counties for which information exists.[39]

In sum, plenary evidence was presented at trial from which the District Court (two of whose members were trial judges in *Gingles*) properly concluded that under the totality of statewide and local circumstances the majority-minority districts created by the General Assembly were narrowly tailored to provide the "equal political opportunity" required by the Voting Rights Act, 861 F. Supp. at 472; JS App at 107a, and incorporated minority populations whose voting rights had been diluted.

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[38] Professor Engstrom's analysis also revealed racially polarized voting in legislative districts in twenty-three counties in District 1. Ex 404, Tables 3A-5C. In addition, the District Court found that the vast majority of the counties included in District 1 are Section 5 counties or are counties that were required to change electoral districts because of Section 2 litigation. 861 F. Supp. at 472; JS App at 107a. A simple mathematical calculation from the census data reveals that 85.5% of the citizens residing in the district live in such counties.

[39] A mathematical calculation reveals that 73.8% of the citizens residing in District 12 live in Section 5 counties or counties involved in Section 2 litigation.

CONCLUSION

This Court should uphold North Carolina's congressional redistricting plan.

Respectfully submitted,

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